Supreme Court, U.S.
FILED
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No. _____

In the Supreme Court of the United States

KHELLEH KONTEH,

Petitioner,

v.

CHRISTOPHER BELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JIM PETRO
Attorney General of Ohio

STEPHEN P. CARNEY*
State Solicitor
**Counsel of Record*
DIANE RICHARDS BREY
Senior Deputy Solicitor
PHILIP KING
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner

QUESTION PRESENTED

The Prison Litigation Reform Act, 42 U.S.C. § 1997e, ("PLRA") requires that "[n]o action shall be brought with respect to prison conditions" under 42 U.S.C. § 1983 or any other federal law, by a prisoner confined in any correctional facility, "until such administrative remedies as are available are exhausted." 42 U.S.C. §1997e(a). The question presented is:

> Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever there is a single unexhausted claim, despite the presence of other exhausted claims?

LIST OF PARTIES

The Petitioner is Khelleh Konteh, the Warden of the Toledo Correctional Institution, and formerly the warden of the Trumbull Correctional Institution ("TCI"), the prison where Respondent, Christopher Bell, was incarcerated during the time when Bell encountered the prison conditions of which he complains.

The Respondent is Christopher Bell, currently an inmate at the Ross Correctional Institution, and formerly an inmate at TCI.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of Khelleh Konteh, the Warden of the Toledo Correctional Institution and former Warden of the Trumbull Correctional Institution ("TCI"), respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion, *Bell v. Konteh*, 450 F.3d 651 (6th Cir. 2006), is reproduced below at 1a-7a. The Sixth Circuit's denial of rehearing en banc is reproduced at 17a. The Decision and Entry of the United States District Court for the Northern District of Ohio (N.D. Ohio 2005) is reproduced at 8a-16a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Sixth Circuit issued its opinion on June 16, 2006. The Sixth Circuit denied the Warden's petition for rehearing on July 19, 2006. The Warden timely filed this petition and invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statutory provisions at issue appear in the appendix to this petition.

INTRODUCTION

This case presents the identical issue pending before the Court in the consolidated cases of *Williams v. Overton*, Case No. 05-7142, *cert. granted*, __ U.S. __, 126 S.Ct. 1463 (2006), and *Jones v. Bock*, Case No. 05-7058, *cert. granted*, __ U.S. ___, 126 S.Ct. 1462 (2006). Petitioner Konteh files this petition for certiorari simply to ask the Court to hold this case until it decides the *Williams* and *Jones* cases, and then to issue a decision in this case consistent with the Court's decisions in *Williams* and *Jones*. Thus, if the Court decides in

Williams and *Jones* to require total exhaustion, the Court should summarily reverse the judgment below. Or, as explained below, the result in *Williams* and *Jones* may call for granting, vacating, and remanding, or other appropriate disposition of this case.

STATEMENT OF THE CASE

Respondent Christopher Bell sued under 42 U.S.C. § 1983 in federal district court against Petitioner Konteh, the Warden at TCI, and two corrections officers, Officer Folmar (no first name given) and Officer Carl Shaffer, seeking damages for conditions of confinement at TCI. Specifically, Bell alleged that the defendants violated his First Amendment rights by retaliating against him for filing grievances, and violated his Eighth Amendment rights by failing to protect him from violence by other inmates. See 2a-3a (description of claims, found in the Sixth Circuit's opinion). The district court dismissed the claims against Folmer as time-barred and later dismissed the retaliation claims against Konteh and Shaffer for failure to state a claim. Respondent Bell did not appeal those orders. See 2a-3a, below.

The district court also dismissed the remaining Eighth Amendment claim against Konteh and Shaffer, concluding that Bell had failed to exhaust his administrative remedies, as required by the PLRA, 42 U.S.C. § 1997e(a). See 12a-16a (district court opinion). Respondent Bell appealed the dismissal of his Eighth Amendment claim against Konteh and Shaffer.

The Sixth Circuit affirmed the district court's dismissal of the Eighth Amendment claim against Shaffer for failure to exhaust administrative remedies, see 4a, but reversed the district court's order dismissing the Eighth Amendment claim against Petitioner Konteh. See 4a-7a. According to the Sixth Circuit panel, because Bell had satisfied the exhaustion requirement against Konteh, the remaining claim against him

could proceed, even though the claim against Shaffer was properly dismissed for failure to exhaust administrative remedies. See 6a-7a. In so holding, the Sixth Circuit panel applied a "partial exhaustion" rule under the PLRA, rather than a rule requiring a prisoner to exhaust all of his claims against all defendants in order to avoid dismissal of his civil rights action. See 6a-7a (citations omitted) ("When a prisoner's complaint contains both exhausted and unexhausted claims, the unexhausted claims should be dismissed without prejudice while the exhausted claims are allowed to proceed.").

Konteh sought panel rehearing of that decision. Konteh asked the panel to grant rehearing and hold the case pending this Court's decision in *Williams* and *Jones*. Those cases present the same issue that is raised here: namely, whether the PLRA requires total, or partial, exhaustion of an inmate's claims through the prison system's administrative grievance process. The Sixth Circuit panel denied rehearing. App. 17a.

This petition followed.

REASONS FOR GRANTING THE WRIT

This petition presents an important question about the PLRA's administrative exhaustion requirement, but one on which the Court already has granted certiorari, in *Williams v. Overton*, 136 Fed. Appx. 859, 2005 U.S. App. Lexis 12277 (6th Cir. 2005), *cert. granted*, ___ U.S. ___, 126 S.Ct. 1463 (2006) (Case No. 05-7142), and *Jones v. Bock*, 135 Fed. Appx. 837, 2005 U.S. App. Lexis 11572 (6th Cir. 2005), *cert. granted*, 126 S.Ct. 1462 (2006) (Case No. 05-7058). The Court has scheduled argument in *Williams* and *Jones* for Monday, October 30, 2006.

The question presented in this case is the same as the second question presented in both *Williams* and *Jones*: Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal

c rights complaint for failure to exhaust administrative r dies whenever there is a single unexhausted claim, despite the presence of other exhausted claims.

In this case, the Sixth Circuit panel reversed the district court's order dismissing the remaining Eighth Amendment claim pursuant to the PLRA for failure to exhaust Bell's administrative grievance remedies. The Sixth Circuit held that "Bell satisfied the PLRA's administrative exhaustion requirement with respect to Konteh but not with respect to Shaffer. When a prisoner's complaint contains both exhausted and unexhausted claims, the unexhausted claims should be dismissed without prejudice while the exhausted claims are allowed to proceed." See 6a-7a. The Sixth Circuit accordingly reversed the dismissal of the Eighth Amendment claim against Konteh, and remanded that claim for further proceedings in the district court. See 7a.

In reversing the dismissal of the Eighth Amendment claim against Konteh, the Sixth Circuit panel in this case necessarily applied a partial-exhaustion interpretation of the PLRA, see 7a, rather than a "total exhaustion" rule. A total exhaustion rule would require the inmate to have exhausted all of the claims in the lawsuit through the prison's administrative grievance procedure, with regard to all defendants. Cf., e.g., *Jones Bey v. Johnson*, 407 F.3d 801, 806 (6th Cir. 2005) ("We now join the Tenth and Eighth Circuits in holding that total exhaustion is required under the PLRA."), *petition for cert. filed* (Jan. 9, 2006) (Case No. 05-874). By contrast, if the "total exhaustion" rule applies here, it would require dismissal of this case in its entirety due to Bell's failure to exhaust all of his claims against all defendants through the prison's administrative grievance procedure.

Petitioner Konteh asks the Court to hold this case until the Court decides the *Williams* and *Jones* cases, and then to decide this case in accordance with the ruling in those cases.

That is, Konteh asks the Court to hold the case until *Williams* and *Jones* are decided, and then to summarily reverse this case, if the Court holds that the PLRA requires a total exhaustion rule, which the Petitioner here urges. If the Court rules otherwise, Konteh asks the Court to grant the petition, vacate the judgment below, and remand the case for further proceedings consistent with *Williams* and *Jones*, or to enter another appropriate disposition of this case. Indeed, it appears that the Court already has held a similar case in light of its certiorari grant in *Williams* and *Jones*. See *Jones Bey v. Johnson*, 407 F.3d 801 (6th Cir. 2005), *petition for cert. filed* (Jan. 9, 2006) (Case No. 05-874).

Holding this case for the decision in *Williams* and *Jones* will serve judicial economy, as the sole issue presented here is the same as one of the issues presented in both of those cases. And holding the case for a ruling consistent with the Court's ruling in *Williams* and *Jones* will preserve Kontch's interest in having the correct rule of PLRA exhaustion—whatever it turns out to be—applied to this case after the Court decides *Williams* and *Jones*.

Accordingly, Petitioner Kontch requests this Court to hold this case for *Williams* and *Jones*, and then either to summarily reverse this case if the Court holds that the PLRA requires a total exhaustion rule, or if the Court rules otherwise, to grant the petition, vacate the judgment below, and remand the case to the Sixth Circuit for further proceedings in light of this Court's decision in those cases.

CONCLUSION

For the above reasons, the Court should hold this petition until the Court issues its decisions in *Williams v. Overton*, Case No. 05-7142, and in *Jones v. Bock*, Case No. 05-7058, and then dispose of this case accordingly, as detailed above.

JIM PETRO
Attorney General of Ohio

STEPHEN P. CARNEY*
State Solicitor
**Counsel of Record*
DIANE RICHARDS BREY
Senior Deputy Solicitor
PHILIP KING
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner

CHRISTOPHER BELL,
Plaintiff-Appellant,
v.
KHELLEH KONTEH et al.,
Defendants-Appellees.

No. 05-3503

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

06a0198p.06;

450 F.3d 651; 2006 U.S. App. LEXIS 14753; 2006 FED App. 0198P (6th Cir.)

June 9, 2006, Submitted
June 16, 2006, Decided
June 16, 2006, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Ohio at Youngstown. No. 01-00915. John R. Adams, District Judge.

COUNSEL: ON BRIEF: Kelley A. Sweeney, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Cleveland, Ohio, for Appellees.

Christopher D. Bell, Marion, Ohio, Pro se.

JUDGES: Before: MOORE, COLE, and CLAY, Circuit Judges.

OPINION BY: KAREN NELSON MOORE

OPINION:

[*652] **[***1]** KAREN NELSON MOORE, Circuit Judge. Plaintiff-Appellant Christopher Bell, an Ohio state prisoner proceeding pro se, appeals the dismissal of his civil rights action against Defendants-Appellees Khelleh Konteh and Carl Shaffer, n1 officials with the Trumbull Correctional Institution ("TCI"). Bell argues that the district court erroneously concluded that he failed to satisfy the Prison Litigation Reform Act's ("PLRA") administrative exhaustion requirement. Because the district court's exhaustion determination was correct as to Shaffer but not as to Konteh, we **AFFIRM** the dismissal without prejudice with respect to Shaffer and **REVERSE** the dismissal with respect to Konteh. We **REMAND** for further proceedings consistent with this opinion.

n1 We adopt the spelling of Shaffer used in the defendants' brief. Appellees Br. a. 3.

[2]**

[*2] I. BACKGROUND**

Bell was a prisoner at Ohio's TCI at all times relevant to this case. n2 Bell sued Konteh, the warden, and Folmer n3 and Shaffer, two corrections officers, under 42 U.S.C. § 1983, **[*653]** alleging that the defendants retaliated against him for filing grievances, in violation of the First Amendment, and failed to protect him from violence by other inmates, in violation of the Eighth Amendment. The district court dismissed as time-barred the claims against Folmer and dismissed him as a party to the suit. The district court dismissed the retaliation claim against Konteh and Shaffer for failure to state a claim. Bell appeals neither of these orders.

n2 Bell is now a prisoner at Marion Correctional Institution.

n3 Folmer's full name is not in the record.

Konteh and Shaffer moved to dismiss the remaining failure-to-protect claim, arguing that Bell had not exhausted the available administrative remedies as required by the PLRA. The district court granted the motion [**3] to dismiss, concluding that Bell had failed to exhaust his claim with respect to both Konteh and Shaffer. n4 Bell now appeals.

n4 The district court did not specify whether the dismissal was with or without prejudice. It is well established, however, that the appropriate disposition of an unexhausted claim under the PLRA is dismissal without prejudice. *See, e.g., Boyd v. Corr. Corp. of Am.*, 380 F.3d 989, 994 (6th Cir. 2004), *cert. denied*, 544 U.S. 920, 125 S. Ct. 1639, 161 L. Ed. 2d 477 (2005); *Dellis v. Corr. Corp. of Am.*, 257 F.3d 508, 510 (6th Cir. 2001); *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998). Thus, we read the district court's order as a dismissal without prejudice.

II. ANALYSIS

We review de novo the dismissal of a suit for failure to exhaust the available administrative remedies as required by the PLRA. *Boyd v. Corr. Corp. of Am.*, 380 F.3d 989, 993 (6th Cir. 2004), *cert. denied*, 544 U.S. 920, 125 S. Ct. 1639, 161 L. Ed. 2d 477 (2005).

Under the PLRA, [**4] "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such

administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Ohio generally employs a three-step inmate grievance procedure that consists of (1) the filing of an informal complaint, (2) the filing of a notification of grievance, and (3) the filing of an appeal of the disposition of grievance. OHIO ADMIN. CODE 5120-9-31(J). Bell was required to follow this procedure before suing Shaffer, but Bell has not cited (and upon independent examination there do not appear to be) any materials in the record indicating that he did so. Thus, the district court correctly concluded that Bell did not administratively exhaust his failure-to-protect claim against Shaffer.

Bell was not, however, required to follow the standard three-step procedure before suing Konteh, because Konteh was TCI's warden. The procedure for grievances against wardens and inspectors of institutional services consists of only a single step: A prisoner simply files a grievance **[**5]** directly with the office of the chief inspector, whose decision is final. OHIO ADMIN. CODE 5120-9-31(L). Bell satisfied the procedure by filing two such grievances against Konteh, Joint Appendix ("J.A.") at 128, 129 (Compl., Ex. kk, ll), which the chief inspector dismissed along with several others not relevant here, J.A. at 113 (Compl., Ex. dd3).

Of course, our administrative-exhaustion inquiry does not end here. As we recently explained, "it is not enough simply to follow the grievance procedure; in order to satisfy the administrative exhaustion requirement, the content of the grievances must be adequate, too. First, **[***3]** under our precedent a grievance must identify each defendant eventually sued. *E.g.*, *Curry v. Scott*, 249 F.3d 493, 504-05 (6th Cir. 2001)." *Spencer v. Bouchard*, 449 F.3d 721, 2006 U.S. App. LEXIS 13846, No. 05-2562, 2006 WL 1528876, at *3 (6th Cir. June 6, 2006). This requirement **[*654]** is easily met in the instant case, as the two grievances named Konteh.

We therefore proceed to the second requirement regarding the content of grievances:

> "a prisoner must have alleged mistreatment or misconduct on the part of the defendant" in his grievance. **[**6]** *Burton v. Jones*, 321 F.3d 569, 575 (6th Cir. 2003). This standard is not a particularly strict one:
>
> > In describing the alleged mistreatment or misconduct, . . . we would not require a prisoner's grievance to allege a specific legal theory or facts that correspond to all the required elements of a particular legal theory. Rather, it is sufficient for a court to find that a prisoner's [grievance] gave prison officials fair notice of the alleged mistreatment or misconduct that forms the basis of the constitutional or statutory claim made against a defendant in a prisoner's complaint.
>
> *Id.* This relaxed standard is consistent with the general practice of liberally construing pro se prisoners' filings. *See, e.g., McNeil v. United States*, 508 U.S. 106, 113, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993); *Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir. 1999).

Spencer, 2006 U.S. App. LEXIS 13846, 2006 WL 1528876, at *3 (alterations in original).

In applying this standard, a grievance must be measured against the claim brought in the prisoner's subsequent suit, which in this case is that Konteh failed in his obligation "to

protect prisoners from [**7] violence at the hands of other prisoners," in violation of the Eighth Amendment. *Farmer v. Brennan*, 511 U.S. 825, 833, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (internal quotation marks omitted); *accord, e.g., Dellis v. Corr. Corp. of Am.*, 257 F.3d 508, 512 (6th Cir. 2001). The first of the two relevant grievances filed by Bell alleged that Konteh "had [Bell] moved to another [u]nit for no justifiable reason"; that Bell's case manager informed Konteh that Bell "should not be housed with" certain other prisoners; and that Bell told Konteh that "if this matter is not resolved [Bell] could be in danger." J.A. at 128 (Compl., Ex. kk). The second grievance alleged that Bell's case manager and others "called . . . Konteh and explained that [Bell] should not be moved down to Unit B because of an imminent threat to [his] safety"; that a number of other prisoners "were very upset that [Bell] had" been moved into their unit; that Bell's cellmate warned Bell, "Man these Youngstown dudes don[']t like you and it gonna be some shit, you better watch your back"; and that one day while Bell was sleeping "at least two prisoners [entered his] cell and jumped" him, [**8] "punch[ing] [him] in the face and head." J.A. at 129 (Compl., Ex. ll). These grievances clearly "gave prison officials fair notice of the alleged mistreatment or misconduct that forms the basis of" Bell's Eighth Amendment failure-to-protect claim against Konteh. *Burton*, 321 F.3d at 575.

Based on the foregoing analysis, Bell satisfied the PLRA's administrative exhaustion requirement with respect to Konteh but not with respect to Shaffer. When a prisoner's complaint contains both exhausted and unexhausted claims, the unexhausted claims should be dismissed without prejudice while the exhausted claims are allowed to proceed. *Spencer*, 2006 U.S. App. LEXIS 13846, 2006 WL 1528876, at *4; *Burton*, 321 F.3d at 574 n.2; *Hartsfield v. Vidor*, 199 F.3d 305, 309-10 (6th Cir. 1999). n5 Thus, [***4] we conclude [*655] that the PLRA requires the claim against

Shaffer to be dismissed without prejudice, while the claim against Konteh may proceed.

> n5 As we recently explained, we are bound to follow the partial-exhaustion rule applied in *Hartsfield* (1999) and reaffirmed in *Burton* (2003) rather than the contrary total-exhaustion rule endorsed by subsequent panels, *e.g.*, *Bey v. Johnson*, 407 F.3d 801, 805 (6th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3424 (U.S. Jan. 9, 2006) (No. 05-874). *See Spencer*, 2006 U.S. App. LEXIS 13846, 2006 WL 1528876, at *4.

[9]**

III. CONCLUSION

For the reasons set forth above, we **AFFIRM** the dismissal without prejudice of the failure-to-protect claim against Shaffer and **REVERSE** the dismissal of the failure-to-protect claim against Konteh. We **REMAND** for further proceedings consistent with this opinion.

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ADAMS, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CHRISTOPHER D. BELL,	)	CASE NO. 4:01CV915
Plaintiff	)	
v.	)	JUDGE JOHN R. ADAMS
	)	**MEMORANDUM, OPINION, AND ORDER**
KELLEH KONTEH, et al.,	)	**[Resolving Doc. 81]**
Defendants;	)	

This matter comes before the Court on Defendants' Motion to Dismiss Plaintiff's Complaint. for the reasons stated herein, Defendants' Motion[Doc. 81] is GRANTED. Specifically, the Court finds that Plaintiff has failed to plead and prove that he has exhausted administrative remedies with respect to his Eighth Amendment "failure to protect" claim brought pursuant to 42 U.S.C. § 1983.

I. PROCEDURAL HISTORY

Plaintiff Bell, an inmate of the State of Ohio, filed his Complaint on April 16, 2001. In his Complaint, Plaintiff alleges that Defendants Kelleh Konteh, Warden at Trumbull

Correctional Institution ("TCI",) and TCI Corrections Officers Folmar and Shaffer retaliated against Plaintiff for filing grievances and lawsuits and failed to protect him from attacks by other inmates. Plaintiff was incarcerated at TCI during the incidents of which he complains.

By order dated July 24, 2001, the Court dismissed all claims against Defendant Folmar. The Court held that all allegations against Folmar were time-barred.

Defendants Konteh and Shaffer answered the Complaint on August 23, 2001. On October 15, 2001, Defendants moved the court for judgment on the pleadings for failure to state a claim upon which relief can be granted.

In a Report and Recommendation dated August 30, 2002, the Magistrate Judge assigned to this case recommended dismissal of Plaintiff's Complaint. Plaintiff did not file objections to the Magistrate's recommendation. This Court adopted the Report and Recommendation of the Magistrate. Plaintiff's Complaint was dismissed with prejudice on September 20, 2002.

On October 10, 2002, Plaintiff filed a Motion for Reconsideration stating that he never received the Report and Recommendation of the Magistrate. On October 22, 2002, the Court vacated its Judgment Entry and reopened the case in order for Plaintiff to file his Objections to the Report and Recommendation.

After seeking an extension of time, Plaintiff filed his Objections to the Report and Recommendation on November 12, 2002. Defendants responded on November 25, 2002.

On January 9, 2003, the Court adopted in part the Report and Recommendation of the Magistrate. Plaintiff's claims for retaliation were dismissed. The court ordered,

however, that Plaintiff's Eighth Amendment claim for failure to protect remains.

On February 13, 2003, the Court ordered the parties to submit briefs concerning whether Plaintiff exhausted his administrative remedies as to his claim for failure to protect.[1] In their Status Report Filed April 1, 2003, Defendants contended that Plaintiff failed to exhaust his administrative remedies as to his failure to protect claim. Plaintiff filed a response, but did not attach grievances to evidence exhaustion.

On August 19, 2004, this Court conducted a telephonic status conference with Plaintiff and counsel for Defendants. Plaintiff indicated that he did not have possession of his legal materials for this case. Defendants' counsel subsequently provided Plaintiff with a copy of every grievance submitted in connection with the allegations contained in Plaintiff's Complaint. Additionally, during the status call, the Court advised Defendants to file a dispositive motion concerning the exhaustion issue.

Defendants' Motion to Dismiss followed on August 23, 2004. After seeking an extension of time to respond, Plaintiff opposed the Motion to Dismiss on October 4, 2004. Defendants have replied to Plaintiff's Opposition. Accordingly, the Motion to Dismiss is ripe for adjudication.

---

[1] On February 21, 2003, this case was transferred to Judge Adams from the docket of Judge Economus.

II. LEGAL STANDARD

A motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6) is evaluated according to the same standard as a motion for judgment on the pleadings brought under Rule 12(c). *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1038 (6th Cir. 1979). In ruling on a motion under either Rule 12(b)(6) or Rule 12(c), the district court may look only at the pleadings themselves and exhibits incorporated by reference into the complaint. *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997). The Court must accept as true all well-pleaded allegations, but does not consider conclusory allegations or legal conclusions masquerading as facts. *See Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). Although the plaintiff enjoys the benefit of all inferences that plausibly can be drawn from well-pleaded allegations, a defendant's motion to dismiss should be granted when it appears beyond a doubt that the plaintiff will be unable to prove any set of facts that would justify relief. *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir. 1973).

It is with the above standard in mind that the Court decides the Motion to Dismiss considered herein. Having set forth the Rule 12(b)(6) and Rule 12(c) standard of review, the Court now turns to an examination of the well-pleaded allegations on record.

III. UNDISPUTED FACTS

Plaintiff is an inmate of the State of Ohio and is serving an indefinite term of incarceration of 25 years to life for a 1991 conviction of Murder, Attempted Murder, Receiving Stolen Property, and Having a Weapon while under a Disability.

Plaintiffs' Complaint alleges that, while he was incarcerated at TCI, Defendants filed to protect him from assault by another inmate. There is no evidence on record to suggest that Plaintiff has ever filed a grievance or sought an administrative decision with respect to his failure to protect claim against Defendants.

IV. ANALYSIS

Under 42 U.S.C. § 1997e(a), a prisoner confined in any jail, prison or other correctional facility may not ring an action challenging "prison conditions" under 42 U.S.C. § 1983 or any other federal law "until such administrative remedies as are available are exhausted." *White v. McGinnis*, 131 F.3d 593, 595 (6th Cir. 1997). To define "prison conditions", courts have utilized the definition of "a civil action with respect to prison conditions" set forth in 18 U.S. § 3626(g). This statute defines a "conditions" suit as "[a]ny civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison. . . ." Plaintiff's Complaint concerning an alleged failure to protect him from harm qualifies as a "conditions" suit as Plaintiff complains of the "effects of actions by government officials." 18 U.S.C. § 3626(g).

In order to satisfy the exhaustion requirement of § 1997e(a) and survive dismissal, an inmate challenging the conditions of his confinement pursuant to 42 U.S.C. § 1983 "must alleged and show that [he has] exhausted all available state administrative remedies . . . a prison should attach to his § 1983 complaint the administrative decision, if it available, showing the administrative disposition of his complaint." *Brown v Toombs*, 113 F.3d 1102, 1004 (6th Cir. 1998).

The administrative remedy at issue in this case is provided to Ohio prisoners in the extensive grievance

procedure set forth in Ohio Administrative Code 5120-9-31 ("O.A.C."). Any prisoner may use this system regardless of his disciplinary status. O.A.C. 5120-9-31(D). The system provides for the prompt resolution of informal complaints and a more structured procedure for dealing with formal grievances. O.A.C. 5120-9-31(J). The procedure for dealing with formal grievances includes neutral, third-party investigation and set time schedules for evaluation of grievances. O.A.C. 5120-9-31(J). It also provides for input by the grieving prisoner into the scope and manner of that investigation a right of appeal to the Chief Inspector of the ODRC, and protection against reprisals. O.A.C. 5120-9-31(H), (J)(1), (2) and (3).

Furthermore, O.A.C. 5120-9-31 includes provisions for the expedited determination of grievances involving danger to prison inmates' personal well-being and requires that inmates be provided with written and verbal instruction on how to utilize the grievance process. O.A.C. 5120-9-31(C) and (E). The Ohio Supreme court ruled that O.A.C. 5120-9-31 provides a sufficiently adequate remedy that must be exhausted before inmates seek to involve the judiciary in the day to day operations of Ohio's prisons, *State ex rel. Humphrey v. Jago*, 74 Ohio St.3d 675, 686 (1996). That holding is consistent with the Sixth Circuit's requirement that federal prisoners exhaust their administrative remedies before filing suit for conditions of their confinement. *Davis v. Keohane*, 835 F.2d 1147, 1148-49 (6th Cir. 1987); *Little v. Hopkins*, 638 F.2d 953-54 (6th Cir. 1981).

Informal prisoner complaints must be sent to the department or supervisor most directly related to the matter at issue no later than fourteen calendar days after the date of the matter of which the inmate complains. O.A.C. 5120-9-31(J)(1). Formal grievance forms must be filed no later than fourteen calendar days after the response to the informal complaint. O.A.C. 5120-9-31(J)(2). Appeals to the Chief Inspector must be sent no later than fourteen calendar days

after the inmate's receipt of the written Disposition of Grievance. O.A.C. 5120-9-31(J)(3).

The issue considered herein is whether Plaintiff has filed any grievances and otherwise exhausted his administrative remedies in accordance with the procedure set forth in O.A.C. 5120-9-31 with respect to his Eighth Amendment failure to protect claim, the sole remaining claim in this case. For the reasons stated below, the court finds that Plaintiff failed to plead that he has exhausted the administrative remedies contained in O.A.C. 5120-9-31, and none of the grievances or any other evidence on record supports Plaintiff's contention that he has exhausted his administrative remedies with respect to this claim.

In order to state an Eighth Amendment claim against prison officials based upon their alleged failure to protect an inmate from attack by other inmates, a plaintiff must allege facts indicating that the defendant's conduct amounted to "deliberate indifference" to a risk of injury. *Farmer v. Brennan*, 511 U.S. 825 (1994); *Walker v. Norris*, 917 F.2d 1449 (6th Cir. 1990); *McGhee v. Foltz*, 852 F.2d 876 (6th Cir. 1988). The deliberate indifference standard, first articulated in *Estelle v. Gamble*, 429 U.S. 97 (1976), has since been extended to impose upon both federal and state correctional officers and officials the obligation to take reasonable steps to protect inmates from violence at the hands of other inmates. *Marsh v. Arn*, 937 F.2d 1056, 1060 (6th Cir. 1991) (citations and quotations omitted).

To prove liability, a plaintiff must demonstrate that the defendant knew of a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to abate it. *Farmer*, 511 U.S. at 839. However, a prison official must exhibit more than a lack of due care for a prisoner's safety before an Eighth Amendment claim will be found. *Id.* at 833. The official both must be aware of facts

from which the inference can be drawn that a substantial risk of harm exists, and he also must draw the inference. *Id.* "It is obduracy and wantonness, not inadvertence or error in good faith, that characterizes the conduct prohibited by the Cruel and Unusual Clause." *Marsh*, 937 F.2d at 1060.

In the instant case, Plaintiff has failed to provide any evidence that he exhausted his administrative remedies with respect to conduct that would give rise to an Eighth Amendment failure to protect claim. Plaintiff alleges that he filed informal complaints and repeatedly "spoke" to defendants and unit staff. However, this is not enough for exhaustion of administrative remedies. "Speaking" to staff is not provided by the O.A.C. as a means to grieve a complaint. Plaintiff's Complaint in this matter fails to allege that he fully complied with the grievance and appeal to the Chief Inspector with respect to his Eighth Amendment claim. Further, none of Plaintiff's informal complaints and grievances pertain to a failure to protect claim; there are n grievances or decisions that allege that Defendants Kontch or Shaffer failed to take reasonable steps to protect Plaintiff from an assault at the hands of another inmate. There are no grievances or decisions that indicate in any way that Defendants Konteh and Shaffer knew of a substantial risk of serious harm and disregarded that risk by failing to take reasonable steps to abate it. Accordingly, Plaintiff has failed to allege and prove that he exhausted his administrative remedies in regard to his cause of action under the Eighth Amendment.

The Sixth Circuit and 42 U.S.C. § 1997e(a) mandate complete exhaustion as a precondition to a prisoner's suit on federal claims and require dismissal if exhaustion did not occur before filing. Plaintiff did not fully comply with the grievance process by filing an informal complaint, a formal grievance, and an appeal to the chief Inspector regarding his

failure to protect claim against Defendants Konteh and Shaffer. As such, dismissal of this case is appropriate.

V. CONCLUSION

For all of the foregoing reasons, the Court grants Defendants' Motion to Dismiss Plaintiff's Eighth Amendment failure to protect claim brought under 42 U.S.C. § 1983. Plaintiff has failed to exhaust administrative remedies with respect to this claim.

IT IS SO ORDERED.

March 11, 2005
Date

/s/ John R. Adams
John R. Adams
U.S. District Judge

Case No: 05-3503

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

CHRISTOPHER D. BELL

Plaintiff-Appellant

v.

FILED
JULY 19 2006
LEONARD GREEN, Clerk

KHELLEH KONTEH, Warden; FOLMER, Correctional Officer; SCHAFER, Correctional Officer

Defendants-Appellees

BEFORE: MOORE, COLE and CLAY, Circuit Judges

Upon consideration of the petition for rehearing filed by the appellees,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY
ORDER OF THE
COURT
/s/ Leonard Green/pge
Leonard Green, Clerk

UNITED STATES CODE SERVICE
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*** CURRENT THROUGH P.L. 109-287,
APPROVED 9/27/2006 ***

42 USCS § 1997e

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure. The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 3 or 5 of this Act [42 USCS § 1997a or 1997c].

(c) Dismissal.

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be

granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees.

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B)

(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).

(e) Limitation on recovery. No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(f) Hearings.

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply.

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) "Prisoner" defined. As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

HISTORY:

(May 23, 1980, P.L. 96-247, § 7, 94 Stat 352; Sept. 13, 1994, P.L. 103-322, Title II, Subtitle D, § 20416(a), 108 Stat. 1833; April 26, 1996, P.L. 104-134, Title I [Title VIII, § 803(d)], 110 Stat. 1321-71; May 2, 1996, P.L. 104-140, § 1(a), 110 Stat. 1327.)

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5120 DEPARTMENT OF REHABILITATION AND CORRECTIONS - ADMINISTRATION AND DIRECTOR
Chapter 5120-9 Use of Force; Institutional Rules

OAC Ann. 5120-9-31 (Anderson 2006)

5120-9-31 The inmate grievance procedure.

(A) The department of rehabilitation and correction shall provide inmates with access to an inmate grievance procedure. This procedure is designed to address inmate complaints related to any aspect of institutional life that directly and personally affects the grievant. This may include complaints regarding policies, procedures, conditions of confinement, or the actions of institutional staff.

(B) The inmate grievance procedure will not serve as an additional or substitute appeal process for hearing officer decisions, rules infraction board decisions or those issues or actions which already include an appeal mechanism beyond the institutional level or where a final decision has been rendered by central office staff. Other matters that are not grievable include complaints unrelated to institutional life, such as legislative actions, policies and decisions of the adult parole authority, judicial proceedings and sentencing or complaints whose subject matter is exclusively within the jurisdiction of the courts or other agencies. Complaints which present allegations which fall, in part, within the scope of paragraph (A) of this rule and in part within this paragraph

will be considered to the extent they are not excluded under this paragraph.

(C) A written explanation of and instructions for the use of the inmate grievance procedure shall be readily available to both staff and inmates. Newly hired staff, and newly incarcerated inmates at reception shall receive a written and oral description of the procedure. Inmates shall also receive information regarding the inmate grievance procedures during orientation at their parent institution. Appropriate provisions shall be made as necessary for inmates not fluent in English, persons with disabilities and those with low literacy levels. All materials used to provide information and training on the inmate grievance procedure to staff and inmates shall be prepared or approved by the office of the chief inspector.

(D) Inmates may utilize the inmate grievance procedure regardless of any disciplinary status, or other administrative or legislative decision to which the inmate may be subject. Appropriate provisions shall be made to ensure access to the inmate grievance procedure by inmates not fluent in English, persons with disabilities, and those with low literacy levels. Each institution shall maintain locked institutional mailboxes for inmates to mail kites, informal complaints, grievances and other institutional correspondence to staff.

(E) Limited restrictions may be imposed, only with the approval of the chief inspector, based upon an inmate's abuse or misuse of the inmate grievance procedure. Such a restriction shall be for a stated period of time not to exceed ninety days and subject to extension by the chief inspector if the inmate has not substantially complied with the restriction requirements. Provisions shall be made to ensure that the inmate can pursue issues that could present a substantial risk of physical injury, such as medical concerns, through the inmate grievance procedure. Any inmate subject to a restriction shall be notified in writing. Such notice shall

include a clear explanation of the nature of the restriction, and the length of time of the restriction, (conditional upon their compliance). The notice shall also include an explanation of how they may pursue issues that could present a substantial risk of harm while on restriction.

(F) An inmate may be subject to disciplinary action for disrespectful, threatening or otherwise inappropriate comments made in an informal complaint, grievance or grievance appeal. Only the inspector of institutional services, with the approval of the chief inspector or designee, may initiate disciplinary action based upon the contents of an informal complaint, grievance or grievance appeal.

(G) Failure of the inmate to substantiate their grievance allegations shall not, by itself, be used as grounds to initiate disciplinary action. If it is found that an inmate has intentionally falsified information in an informal complaint, a grievance, or grievance appeal, only the inspector of institutional services, with the approval of the chief inspector or designee, has the authority to initiate disciplinary action against the inmate.

(H) Retaliation or the threat of retaliation for the use of the inmate grievance procedure is strictly prohibited. Any alleged or threatened retaliation may be pursued through the inmate grievance procedure. Appropriate disciplinary action shall be taken against any employee found to be in violation of this section.

(I) Grievance records are considered confidential and shall be maintained by the inspector of institutional services in a secure manner. No grievance records shall be placed in any inmate file which is available to the adult parole authority, except when the record is the basis of disciplinary action initiated by the inspector and authorized by the chief inspector.

(J) The inmate grievance procedure shall be comprised of three consecutive steps fully described below. Whenever feasible, inmate complaints should be resolved at the lowest step possible. There is a specific form design..ted by the chief inspector to use for each step. Only forms designated by the chief inspector may be used in this process. Such forms shall be reasonably available to inmates regardless of their disciplinary status or classification. Inmates shall not be required to advise a staff member, other than the inspector of institutional services, of the reason the form is being requested.

(1) The filing of an informal complaint - step one:

Within fourteen calendar days of the date of the event giving rise to the complaint, the inmate shall file an informal complaint to the direct supervisor of the staff member, or department most directly responsible for the particular subject matter of the complaint. Staff shall respond in writing within seven calendar days of receipt of the informal complaint. If the inmate has not received a written response from the staff member within a reasonable time, the inmate should immediately contact the inspector of institutional services either in writing or during regular open office hours. The inspector of institutional services shall take prompt action to ensure that a written response is provided to the informal complaint within four calendar days. If a response is not provided by the end of the fourth day, the informal complaint step is automatically waived. Informal complaint responses should reflect an understanding of the inmate's complaint, be responsive to the issue, cite any relevant departmental or institutional rules or policies and specify the action taken, if any. The inspector of institutional services shall monitor staff compliance with the informal complaint process. Any pattern of non-compliance by staff shall be reported to the warden for appropriate action. The filing of an informal complaint may be waived if it is determined by the inspector of institutional services that there is a substantial

risk of physical injury to the grievant, the complaint is filed pursuant to rule 5120-9-03 or 5120-9-04 of the Administrative Code, paragraph (H) of this rule, or for other good cause.

(2) The filing of the notification of grievance - step two:

If the inmate is dissatisfied with the informal complaint response, or the informal complaint process has been waived, the inmate may obtain a notification of grievance form from the inspector of institutional services. All inmate grievances must be filed by the inmate no later than fourteen calendar days from the date of the informal complaint response or waiver of the informal complaint step. The inspector of institutional services may also waive the timeframe for the filing of the notification of grievance, for good cause. The inspector of institutional services shall provide a written response to the grievance within fourteen calendar days of receipt. The written response shall summarize the inmate's complaint, describe what steps were taken to investigate the complaint and the inspector of institutional service's findings and decision. The inspector of institutional services may extend the time in which to respond, for good cause, with notice to the inmate. The chief inspector or designee shall be notified of all extensions. Any extension exceeding twenty-eight calendar days from the date the response was due must be approved by the chief inspector or designee. Expedited responses shall be made to those grievances that, as determined by the inspector of institutional services, present a substantial risk of physical injury to the grievant or for other good cause.

(3) The filing of an appeal of the disposition of grievance - step three:

If the inmate is dissatisfied with the disposition of grievance, the inmate may request an appeal form from the inspector of institutional services. The appeal must then be filed to the office of the chief inspector within fourteen

calendar days of the date of the disposition of grievance. For good cause the chief inspector or designee(s) May waive such time limits. The chief inspector or designee(s) Shall provide a written response within thirty calendar days of receipt of the appeal. The chief inspector or designee(s) May extend the time in which to respond for good cause, with notice to the inmate. The decision of the chief inspector or designee is final. Grievance appeals concerning medical diagnosis or a specific course of treatment shall be investigated and responded to by a health care professional.

(K) Appropriate remedies for valid grievances shall be provided. Potential remedies may include, but are not limited to: changes to institutional policies or procedures, the implementation of new policies or procedures, and/or corrective action specific to the inmate's complaint. (For example, a correction to the inmate's account, locating lost property, etc.) If the resolution of a grievance or portion thereof, is not within the scope of authority of the inspector of institutional services, the inspector of institutional services shall submit the findings and recommendations concerning the grievance to the warden for the warden's approval, modification or disapproval. The warden shall respond to the inspector of institutional services within fourteen calendar days. The inspector of institutional services shall provide to the office of the chief inspector the report to the warden, that includes the warden's decision.

(L) Grievances against the warden or inspector of institutional services must be filed directly to the office of the chief inspector within thirty calendar days of the event giving rise to the complaint. Such grievances must show that the warden or inspector of institutional services was personally and knowingly involved in a violation of law, rule or policy, or personally and knowingly approved or condoned such a violation. The chief inspector or designee(s) Shall respond within thirty calendar days of receipt of the grievance. The chief inspector or designee(s) May extend the time in which

to respond for good cause, with notice to the inmate. The decision of the chief inspector or designee is final.

History: Effective: 01/20/2006

Promulgated Under: 111.15

Statutory Authority: 5120.01, 5120.06, 5120.42

Rule Amplifies: 5120.01, 5120.06, 5120.42

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